was unlawfully in the street, as they had not consented to the construction, or conveyed the right to interfere with their easements." He remarks that in the principal case there was "an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad," and concludes that "hence, the principles upon which that mass of litigation proceeded have no application to this case." O'BRIEN, J., p. 278. But this position seems quite as untenable as the other, for, in the *Story* case, the ruling that, "as against abutting owners, the railroad was unlawfully in the street," was based wholly on the doctrine that the maintenance of the viaduct amounted to a taking of the plaintiff's property (*i. e.* his highway easements), not on the fact that he had not consented to its erection in the street. Indeed, it is well settled that no compensation need be made abutting owners for the consequential injury caused by the construction of railroads in highways owned by the public (as they are owned in New York City). *Forbes* v. *Railroad* (1890) 121 N. Y. 505. Their consent would seem to be unnecessary. By the mere acquisition of the right, as against Fries, to operate its road in the cut, the Harlem Company did not acquire the right to cut off his light and air sixty years later; those easements were not interfered with until the erection of the viaduct.

It will hardly be seriously contended that the elevation of the tracks amounted to a change in the grade of the highway, and thus came within the principle of *Radcliff's Executors* v. *Mayor, etc., supra.* The law, then, is left in a curious condition: under the holdings of the court, (1) a surface road may be laid in the streets of New York without liability to the abutting owners; (2) if an elevated railroad be constructed, it is necessary to compensate property owners for the consequent interference with their highway easements; (3) the tracks of a surface road may be transferred to an elevated structure without making any compensation. The logical result seems to be that it is possible to escape the heavy liability incident to the construction of elevated railroads by first acquiring the right to lay tracks on the surface of the streets.

CONFLICT OF LAWS IN CONTRACTS OF CARRIAGE.—Several years ago the Supreme Court decided that stipulations in a bill of lading exempting the carrier from liability for negligence were void, although they were valid both by the law of New York where the contract was made and by the law of England where performance was to be completed, with reference to which it was contended that the parties had contracted. *Liverpool Steam Co.* v. *Phenix Ins. Co.* (1888) 129 U. S. 397. As to what the result would have been, had the parties expressly stipulated that the English law should control, the court declined to express an opinion. Since that time although several cases involving this question have been decided by the inferior Federal courts, only one case bearing upon the point has come before the Supreme Court. *Knott* v. *Botany Mills* (1900)

179 U. S. 69. That case, however, turned upon the interpretation of the Harter Act, 27 U. S. Stat. at Large, 445. See 1 COLUMBIA LAW REVIEW, 61. The question was decided in a recent case where it was held that exemptions from liability for negligence to a passenger or baggage were void, although the contract was made in Belgium, was valid by the law of that country, and contained a stipulation that any question arising under it should be governed by that law. *The Kensington* (1902) 22 Sup. Ct. 102.

While this important decision is in accord with the trend of the decisions of the Supreme Court, it does not seem to be consistent with *dicta* of that court nor is it a result of a liberal application of well settled principles in the conflict of laws. In the *Liverpool Steam Co.* case it was said that contracts of carriage from one country to another made by citizens or residents of the former must be governed by the law of that country, except where a clear intention to the contrary is expressed. In the principal case no importance was attached to the fact that both carrier and passenger were American citizens, so that the exception would clearly apply. That result was obviated by applying the principle that though the *lex loci contractus* controls the validity and interpretation of a contract, the contract must not violate the public policy of the place where its enforcement is sought, and since the Federal courts have held that it is against public policy for a carrier to exempt himself from liability for negligence, the contract should not be enforced. This principle has been generally recognized, but the English and American State courts have applied it liberally. The general rule seems to be that courts will recognize and enforce contracts made in foreign jurisdictions unless they are positively forbidden by the *lex fori* or are immoral or unjust or are such that their enforcement would be prejudicial to the interests of the jurisdiction or of its citizens. Story, Conflict of Laws, 8th ed. § 244; *Bank* v. *Netherlands, etc., Co.* (1883) 10 Q. B. D. 521; *The Industrie* [1894] P. 58. The courts have not usually been content to announce, as did the Supreme Court, that "the existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion," without inquiring into the reasons of the rule and ascertaining whether the interests of the country would be prejudiced by the enforcement of such contracts made in foreign countries. See *Rousillon* v. *Rousillon* (1880) 14 Ch. D. 351. On the contrary, unless it appears that the contract was made with a view to avoid the operation of the *lex fori*, the courts are not astute to find in it a violation of public policy. Such at least is the attitude of many courts toward foreign contracts which violate domestic usury and Sunday laws, and it is thought to be the better view. Dicey, Conflict of Laws, Am. ed. 580, ff. Why a different point of view should be taken in regard to contracts of carriage is not entirely clear.

It would seem that the principal case could have been decided, without resorting to the argument of public policy, by holding that the Harter Act applies to baggage as well as freight, and that since

that act by implication forbids general exemptions from liability for negligence the contract was unenforceable in the United States, without regard to the *lex loci cantractus* or the agreement of the parties to be governed by it. The court, however, did not emphasize this point. This decision, therefore, seems to cover the whole field of foreign shipping contracts, with the result that unless the carrier brings himself within the narrow limits of section 3 of the Harter Act, which protects him in some respects, his common law liability for negligence cannot by any form of contract be limited, and exemptions to that effect will not be enforced in the Federal courts.

SPECIFIC PERFORMANCE, BY ENFORCING AN IMPLIED NEGATIVE COVENANT.—Shall a court of equity compel, by indirect means, the doing of an act, the positive performance of which it will not decree? The question has, it is said, been answered affirmatively in that class of cases of which *Lumley* v. *Wagner* (1852) 1 De G., M. & G. 604, is the leading case. There the defendant agreed to sing at the plaintiff's theatre for a certain length of time, also agreeing not to sing at any other place, without the permission of the plaintiff. Subsequently, the defendant broke her contract and agreed to sing at another theatre. The plaintiff prayed for an injunction, which was granted by Lord ST. LEONARDS, C., who rendered his decision on the ground that there was an express negative covenant, to which he could give effect. He says, at p. 622, " . . . I may at once declare, that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at her Majesty's Theatre, I should not have granted any injunction." Looking at this case alone, we find that although a court of equity can not decree specific performance of a contract for personal services, it will, where there is a negative covenant, reach the desired result by indirect means. The reason for applying here for equitable relief is the inadequacy of the remedy at law, because money damages could not be satisfactorily computed, nor give adequate compensation. Few decisions have given rise to so many misunderstandings and adverse criticisms as has this famous case. The court could not have compelled the plaintiff to employ the defendant and, there being no mutuality to the agreement, equitable relief should have been refused. *Clarke* v. *Price* (1819) 2 Wils. Ch. 157. The court compelled the defendant to remain idle and prevented her from earning a large salary.

To sustain *Lumley* v. *Wagner*, the Chancellor referred to the case of *Morris* v. *Colman*, 18 Ves. 436, decided by Lord ELDON, C., in 1812. But, as pointed out in the later case of *Clarke* v. *Price*, *supra*, Lord ELDON granted the injunction solely on the ground that he was giving effect to a partnership agreement, and he refused to grant an injunction in the *Clarke* case, because of want of mutuality. In *Kemble* v. *Kean* (1829) 6 Sim. 333, SHADWELL, V. C., had, on facts on all fours with those in *Lumley* v. *Wagner*, refused to grant an in-